With respect, I think the learned counsel has misread the provision of s 41B(1)(b) of the Act when he contended that the restriction on bail does not apply if the accused is sentenced to five years' imprisonment. The operative words under this section are 'punishable with imprisonment'. This phrase means the power of punishment which the court has under the law and not the punishment which the court may choose to impose. As an accused charged with an offence under s 39A(2) of the Act is liable to an imprisonment term for life (five years being the minimum), it is clear that that is an offence within the ambit of s 41B(1)(b) of the Act.

I am therefore of the view that the learned judge of the Sessions Court was right in refusing bail as the offence under s 39A(2) is punishable with imprisonment of more than five years.

For the above reasons, I would dismiss this application.

Application dismissed.

Solicitors: *PG Segran Associates.*

Reported by *Al-Mansor Adabi*

Public Prosecutor v Annamaly a/l Narayanan

HIGH COURT (SEREMBAN) – CRIMINAL APPEAL NO 51-33 OF 1987
MUSTAPHA HUSSAIN J
25 AUGUST 1988

Land Law – Housing developers – Unlicensed housing development affected by collapse of housing market – Demand by purchasers for refund of purchase moneys – Directive issued by Deputy Minister of Housing directing refunds to be made – Failure of housing developer to comply with directive – Whether directive was ultra vires the Housing Developers (Control and Licensing) Act 1966 – Housing Developers (Control and Licensing) Act 1966, ss 11 & 12

The respondent was the managing director of a housing developer company which was engaged in a housing development in Negeri Sembilan without having a licence to do so. The housing market collapsed and the respondent's company could not proceed with the housing scheme. The prospective buyers who had booked the houses demanded a refund of their money and the Deputy Minister of Housing subsequently issued a directive under s 12 of the Housing Developers (Control and Licensing) Act 1966 ('the Act') directing the respondent to make the refunds. The respondent failed to carry out the refunds and was therefore charged in the Magistrate's Court for failure to comply with the Deputy Minister's directive. The learned magistrate acquitted and discharged the respondent, holding that the directive was bad in law as it was not consistent with the scope and objective of s 12 of the Act and was ultra vires the Act. The Public Prosecutor appealed against the learned magistrate's order.

Held, dismissing the appeal:

(1) Section 12 of the Act gives the minister powers to give to a housing developer such directions as he considers 'fit and proper for the purpose of ensuring compliance with the Act ...' However, the provision for the refund of purchase moneys is not found anywhere in the Act, and the refund of moneys cannot by any stretch of the imagination come within the scope of the 'purpose of ensuring compliance with this Act' as found in s 12. The legislature would have spelt out in clear and unequivocal terms if it had that intention.

(2) The proper forum to claim refund of the purchase price would be the courts which, after hearing the case, could decide how much money is to be refunded, how much interest is to be paid in addition and from what date to be so calculated.

Cases referred to

1 *Pemungut Hasil Tanah, Kota Tinggi* v *United Malayan Banking Corporation* [1981] 2 MLJ 264 (folld)
2 *Magor & St Mellons Rural District Council* v *Newport Corporation* [1952] AC 189 (refd)

Legislation referred to

Housing Developers (Control and Licensing) Act 1966 ss 5, 11, 12

Zainal Adzam bin Abdul Ghani (Deputy Public Prosecutor) for the appellant.
Seeralan Ganeshmurugan for the respondent.

Cur Adv Vult

Mustapha Hussain J: The respondent was the managing director of a housing developer company known as Kemajuan Revathy (M) Sdn Bhd with the registered office at No 6 (1st floor) Jalan Sungei, Seremban. The company held a licence issued under s 5 of the Housing Developers (Control and Licensing) Act 1966 (exh P3) to carry out housing development on Lot 2342 Mukim Tebrau in the district of Johore Bahru in the State of Johore over a period of two years from 16 September 1983 to 15 September 1985. The licence was issued on 16 September 1983. The application for the licence was made on 26 February 1983 (exh P2).

The respondent and his company had no licence to carry out any housing development scheme in Negeri Sembilan at all.

However, much earlier than the application and issuance of the licence for the scheme in Mukim Tebrau, the respondent's company was engaged in a housing development project in the Port Dickson area and was collecting deposits and payments by instalments from prospective buyers – all without licence from the Ministry of Housing. Receipts for all these collections were dated from 3 February 1981 to 12 January 1984. Clearly the respondent's company was engaged in housing development and collecting the deposits and instalments without having a licence to do so – as far as the project in Negeri Sembilan was concerned.

Then the land and housing market collapsed and somehow the respondent's company could not proceed with the housing scheme in Negeri Sembilan. The prospective buyers who had booked houses demanded the refund of their money, and the aid of the Ministry of Housing was sought. A meeting was held on 7 August 1984 chaired by the Deputy Minister for Housing. The respondent attended the meeting and promised to refund all money collected including interest to people from whom the payments had been collected, at 10 am on 7 November 1984 (exh P6).

All those who had made payments turned up on 7 November 1984 and the respondent also turned up but without the money to be refunded amounting to $81,002.50. Following this, the Deputy Minister of Housing issued a directive dated 29 April 1985 under s 12 of the Act, directing the respondent to make the refunds to 16 purchasers within three months from the date of the directive. The respondent failed to carry out the refunds in accordance with the directive and he was therefore charged in the Magistrate's Court, Seremban, for failure to comply with the Deputy Minister's directive. The charge reads as follows:

> That you on 30 July 1985, being the managing director of Kemajuan Revathy (M) Sdn Bhd, No 6, 1st floor, Jalan Kong Sang (Jalan Sungai), Seremban, in the State of Negeri Sembilan, a licensed housing developer issued with a licence No 2262/9-85/526 for the period 16 September 1983 to 15 September 1985, having been issued a directive by the Honourable Deputy Minister of Housing and Local Government in a letter dated 29 April 1985 directing you to make a refund of deposit to 16 complainants within three months from the date of this letter and having failed to comply with the Honourable Deputy Minister's directive, have acted contrary to s 12 of the Housing Developers (Control and Licensing) Act 1966 and thereby committed an offence punishable under s 19(d) of the same Act.

At the end of the prosecution's case, the learned magistrate held that the prosecution had failed to prove a prima facie case and acquitted and discharged the respondent. He held that the directive by the Deputy Minister was bad in law as it was not consistent with the scope and objective of s 12 of the Act and was ultra vires the Act. Hence the non-compliance of a directive bad in law cannot be an offence.

The Public Prosecutor has appealed against that order of the learned magistrate acquitting and discharging the respondent without his defence being called.

A close study of s 11 of the Act clearly discloses that the Minister (which includes the Deputy Minister) can issue directions to any developer for the purpose of safeguarding the interests of purchasers. Section 11 reads as follows:

> 11(1) Where on his own volition a licensed housing developer informs the Controller or where as a result of an investigation made under section 10 or for any other reason the Controller is of the opinion that the licensed housing developer becomes unable to meet his obligations to his purchasers or is about to suspend his building operations or is carrying on his business in a manner detrimental to the interests of his purchasers, the Minister may without prejudice to the generality of the powers of the Minister to give directions under section 12 for the purpose of safe-guarding the interests of the purchasers of the licensed housing developer –
>
> (a) direct the licensed housing developer in question to take such steps as he may consider necessary to rectify any matter or circumstance;
>
> (b) direct that a person be appointed or himself appoint a person to advise the licensed housing developer in the conduct of his business;
>
> (c) with the concurrence of the Minister of Finance direct a company to assume control and carry on the business of the housing developer upon such terms and conditions as the Minister may determine;
>
> (d) direct that the licensed housing developer present a petition to the High Court for the winding up of his business; or
>
> (e) take such action as the Minister may consider necessary in the circumstances of the case for carrying into effect the provisions of this Act.

Section 11 of the Act specifies various matters or circumstances of which the Minister can give directions.

Section 12 of the Act gives the Minister powers to give to a housing developer such directions as he considers *'fit and proper for the purpose of ensuring compliance with the Act ...'*

The question central to this appeal is whether the direction to the developer (respondent) to refund the moneys so far collected by him from the prospective purchasers, comes within the ambit of ss 11-12 of the Act.

It was said in *Pemungut Hasil Tanah, Kota Tinggi* v *United Malayan Banking Corpn Bhd*[1] at p 269 that a statute may not be extended to meet a case for which provision has clearly and undoubtedly not been made (citing the House of Lords case of *Magor & St Mellons Rural District Council* v *Newport Corporation*[2]).

Clearly the provision for refunding of purchase moneys is not found anywhere in the Act, and the refunding of moneys cannot by any stretch of the imagination come within the scope of the *'purpose of ensuring compliance with this Act'*. The legislature would have spelt out in clear and unequivocal terms if it had that intention.

Directing a housing developer company who has been carrying on housing development business without a licence issued under s 5 of the Act, to apply for such a licence is a circumstance that comes within the meaning of *'ensuring compliance with this Act'*.

So also directing the developer to comply with the standardized contracts of sale, taking up a permit for advertisement, to conform to the condition, duties and to audit the accounts which are spelt out in the Act to ensure compliance. Surely the refund of purchase moneys is not within the ambit of ss 11-12.

The innocent purchasers are not without remedy. They can always sue the respondent for the refund of whatever money they have paid for the purchase of houses, including interest.

The proper forum to claim refund of the purchase price would be the courts which, after hearing the case, could decide how much money is to be refunded, how much interest is to be paid in addition and from what date to be so calculated.

Though the Minister's directive is commendable and indeed in the interests of the innocent purchasers, sadly, the refunding of the moneys paid by the purchasers is not provided for in the Act.

The appeal is dismissed.

Order accordingly.

Solicitors: *Mahadevi Ganeshmurugan & Co.*

Reported by *Ng Sheau Jiuan*

Public Bank Bhd v Rasatulin Holdings Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C2-23-3785-86
SITI NORMA YAAKOB J
12 AUGUST 1988

Banking – Notice of demand on guarantors for repayment of fixed loans – Service of – Mode of service stipulated in guarantees to be by ordinary post – Whether service by AR registered post constituted proper and effective service

Banking – Non-compliance with requirements of s 4 of Bankers' Books (Evidence) Act 1949 – Subsequent filing of affidavit to comply with requirements on day of appeal – All necessary to remedy omission already done – Filing affidavit at eleventh hour not to be taken against plaintiff

Civil Procedure – Filing affidavit to comply with requirements of s 4 of Bankers' Books (Evidence) Act 1949 on day of appeal – All necessary to remedy omission already done – Filing affidavit at eleventh hour not to be taken against plaintiff

The first defendant was sued by the plaintiff for the non-repayment of two fixed loan facilities granted to them. The fourth and fifth defendants were directors of the first defendant and were sued in their capacities as guarantors of the two fixed loans. Under cl 8 of the two guarantees executed by the fourth and fifth defendants, service of the notice of demand may be effected in one of two ways, ie by personal service or by posting the notice through the post at the addresses mentioned in the guarantees. The plaintiff, instead of sending the notices by ordinary post, sent them by AR registered post. In the first, fourth and fifth defendants' appeal against summary judgment entered against them, the fourth and fifth defendants contended that there was no proper and effective service of the demand notices on them. In addition, the defendants also submitted that there was no compliance with s 4 of the Bankers' Books (Evidence) Act 1949 by the plaintiff.

Held, allowing the appeal:

(1) By sending the notices by way of AR registered post, the plaintiff has varied cl 8 of both guarantees. By so choosing, the plaintiff has also burdened themselves with the added responsibility of seeing that the AR cards shall be returned to them duly acknowledged by the fourth and fifth defendants for there to be proper service of such notices on them. In this case, both the AR cards were returned with the endorsements 'kembali tidak boleh dituntut'. There was thus no proper and effective service of such notices on the fourth and fifth defendants.

(2) The plaintiff's solicitors sought to remedy their omission by filing an affidavit to comply with the requirements of s 4 on the day the appeal was heard. Since the appeal was in the nature of a rehearing, the court considered that the plaintiff had done whatever was necessary to remedy their omission and this should not be taken against them, even though such remedy was made at the eleventh hour.

Legislation referred to
Bankers' Books (Evidence) Act 1949 s 4

James Selva for the first, fourth and fifth defendants/appellants.
PG Cheah for the plaintiff/respondent.

Cur Adv Vult

Siti Norma Yaakob J: Only two issues were raised by the first, fourth and fifth defendants in their appeal against an O 14 judgment entered against them on 19 May 1987. The first is the service of the notices of demand on them, dated 1 October 1986.

At the material time, the first defendant was a customer of the plaintiff and they are sued for the non-repayment of two fixed loan facilities granted by the plaintiff pursuant to two loan agreements dated 23 July 1981 and 25 March 1982. The fourth and fifth defendants were directors of the first defendant and they are sued in their capacities as guarantors for the repayment of the two fixed loans pursuant to two guarantees dated 27 February 1982 and 8 March 1982.

From the plaintiff's own documents, it is clear that the notice of demand dated 1 October 1986 although addressed to the first defendant, was acknowledged to have been received by a company called Sri Alam Sdn Bhd, who is in no way connected to these proceedings.

Under cl 8 of the two guarantees executed by the fourth and fifth defendants, service of the notice of de-